Notice Requirements – Practices in Violation – Posting notice at town hall insufficient when public body usually supplemented that method with others

Minutes
– Procedure – Brief delay in approval permissible
– Generally – Minutes to disclose how each member votes when a recorded vote is required

June 27, 2011

Mr. Peter J. Heck
Complainant

Town of Rock Hall
Respondent

We have considered the complaint of Mr. Peter J. Heck ("Complainant"), a reporter for the Kent County News, that the Town of Rock Hall ("Town") violated the Open Meetings Act (the "Act") with respect to meetings held on February 8, 2011, and March 7, 2011, and with respect to its minutes.

For the reasons stated below, we conclude that the Town violated the Act in some of the ways alleged by the Complainant. The facts and the parties' allegations are set forth in the discussion.

I

Discussion

A. The February 8, 2011 meeting

Complainant alleges that the Town moved its regular February 10, 2011, meeting to February 8, 2011 without giving adequate public notice of the change. Complainant states that the Kent County News ("the newspaper") covers the Town's regular meeting every month and is the only media organization providing ongoing coverage of the Town Council; that the Town's website lists the schedule for its regular meetings; that the Town's longstanding practice has been to notify the newspaper of changes in its meeting dates by telephone or at the preceding meeting; that the Town did not do so in this case; and that a reporter traveled to Rock Hall on February 10, 2011, to attend the regular meeting and found the Town building closed.

The Town states that it posts its meetings on a bulletin board next to the Town office and has done so for 30 years; that it changed the meeting date to avoid a conflict with a mayors' convention in Annapolis; that it posted the February 8, 2011, meeting "on or about" February 4, 2011; that the use of a bulletin board is an acceptable means of giving notice; and that the Act did not require it to notify the newspaper directly. The Town also states that the reporter who covers its meetings should have known that it always posts its meeting dates on the bulletin board. The reporter in question denies any knowledge of that practice and states that, in any event, the Town should use additional means of giving public notice. We infer from the Town's silence on the subject of the website that the Town did not also post the change there.

The Act requires public bodies to give "reasonable advance notice" of meetings subject to the Act. Section 10-506(a) of the State Government Article ("SG"). Public bodies have "considerable flexibility in terms of the method of giving notice." 4 *OMCB Opinions* 88, 98 (2004). That flexibility, however, is conditional:

> One option under the statute is to post notice at a convenient public location at or near the location of the meeting "if the public body previously has given notice that this method will be used." § 10-506(c)(3) [of the State Government Article]. Posting a notice is easy and convenient for a public body. But it is only a lawful means of notice if interested persons have previously been told where to look.

Id. Section 10-506(c), subparts (3) and (4), additionally permit a public body to give notice on an Internet website ordinarily used by the public body to provide information to the public and "by any other reasonable method" – but, in both cases, only if the public body has previously given the public notice of the method to be used. Accordingly, in determining the sufficiency of public notice under the Act, we have looked to whether the method was "consistent with any previous announcement about use of [that method]." 4 *OMCB Opinions* at 98.

When a public body has had to call a meeting on short notice because of unexpected developments, it must "provide the best public notice feasible under the circumstances." 1 *OMCB Opinions* 38, 39 (1993). We have agreed with the guidance of the Attorney General that "'[i]f events require the prompt convening of a previously unscheduled meeting, the public body would be well-advised to provide telephone notice to reporters who are reasonably thought to be interested and a written notice should be placed in the customary public place as quickly as possible.'" *Id.*, citing Office of the Attorney General, *Open Meetings Act Manual* 15 (1992).

Here, the problem is not that the Town posted the change on its bulletin board, but that the Town, without notice and without any apparent emergency, stopped using its three other methods when it decided to convene its monthly meeting two days early. Even assuming that the Town did not know about the scheduling conflict in time to announce the change at its previous regular meeting (a fact we do not know), it was feasible for the Town to contact the newspaper which regularly covers its meetings. It may also have been feasible for the Town to post the change on its website. We therefore conclude that the Town did not provide the best public notice feasible under the circumstances and thereby violated the Act.[1]

We do not mean that a public body may not use a bulletin board,[2] or that a public body must always contact the media, or that a public body must undertake extreme and onerous measures to track down every interested member of the public. Rather, we simply apply our earlier-stated rule that a public body which, on short notice, advances the date of a previously-scheduled and announced meeting must provide "the best public notice feasible under the circumstances." *See* 1 *OMCB Opinions, supra,* at 39. A sudden schedule change will often necessitate the use of more methods than the minimum permissible for regularly-scheduled meetings. Particularly, a public body which notifies the public of regular meeting dates on a website should not assume that people will continuously go to a building to check a bulletin board for changes.

We encourage the Town to continue to use a combination of methods of providing notice to the public and to look upon the public notice requirement not as a mere technicality, but, consistently with the Legislature's intent, as a means of "increas[ing] the faith of the public in government." SG § 10-501(b)(2). Put another way, a public body's decision to re-schedule a meeting, when combined with minimal efforts to publicize the change, is unlikely to create the impression that the public body wishes to operate in the open.

We further encourage the Town to specify on its posted notices the date of the posting so that it may establish that date with more particularity than

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[1] We have given the Town the benefit of the doubt by treating this meeting as one necessitated by unexpected developments. The Town moved this regular meeting up by two days because of a convention in Annapolis, and it describes its regular meetings as opportunities to "report on matters of public concern to the Town's citizens." These facts do not suggest urgency.

[2] However, the public notice requirement is not satisfied by a notice on a bulletin board which is inaccessible to people who cannot inspect it during business hours. 1 *OMCB Opinions* 186, 189 (1996).

provided here by its reference to a posting "on or about" the Friday before its Tuesday meeting.

B. The March 7, 2011 meeting

Complainant alleges that the Town Council held a meeting on March 7, 2011, without providing adequate notice. The Town responds that the meeting "was a special public meeting convened ... for the purposes of discussing bids for exterminators to remedy a termite infestation in the Town office building and discussing a matter relative to a Planning and Zoning meeting scheduled for March 9." The Town states that it posted a notice of the meeting on the bulletin board on March 3, 2011. As with the February 8, 2011 meeting, we do not know when the Council decided to hold this meeting, but, for the reasons stated above with respect to that meeting, we find that the Council did not provide the best notice feasible under the circumstances.

C. Minutes – timetable for approval

Complainant alleges that the Town Council conducts two types of meetings each month and keeps minutes for each event, but then only approves the minutes of each meeting at the next meeting of that type. Specifically, the regular meeting minutes are approved only at the next regular meeting and the workshop meeting minutes are approved at the next workshop meeting. Complainant asserts that the Council should approve minutes at its next meeting, whether regular or workshop.

The Town responds that the two types of meetings serve different purposes: regular Council meetings fulfill the function of informing the public on matters of public concern, while workshop meetings provide the Mayor and Council "an opportunity to deliberate on matters of public concern." The Town further states that the publishing and approval process for each type of meeting is generally complete within 30 days of the event. The Town has not submitted information on whether it is practicable to provide minutes earlier.

On the date of the meetings in question, the Act provided, "As soon as practicable after a public body meets, it shall have written minutes of its session prepared."[3] SG § 10-509 (b). This requirement "permits a public body to take a reasonable amount of time to review draft minutes for accuracy and to approve the minutes...." 2 *OMCB Opinions* 87,88 (1999). The Act "does not impose a rigid time limit." *Id.* We have found routine delays of several

[3] As of June 1, 2011, the Act provides for two exceptions to the written minutes requirement; neither is relevant here.

months to be unreasonable, *id*. at 89, and we have found a delay of "a mere ten days" not unreasonable. 3 *OMCB Opinions* 85, 90 (2001).

The Town's website shows that the Mayor and Council hold workshop meetings and meet as the Utilities Commission on the same evening, 10 days before each regular meeting. For example, in April 2011, the Mayor and Council held both their Utilities Commission and workshop meetings on April 4, 2011, and their regular meeting on April 14, 2011. That month, Town staff would have had eight business days, including the day of the regular meeting, in which to prepare the workshop minutes for approval at the regular meeting, and then less than three weeks in which to prepare the regular minutes for approval at the workshop meeting. We do not believe that the Act requires the Town to adhere to such a rigid time limit, and we therefore find that the Town has not violated SG § 10-509 (b).

D. Minutes - posting on website

Complainant also complains that the workshop minutes are posted on the Town's website only as a section of, and under the link for, the "Utility Commission" minutes. He states that posting the workshop minutes under that link is misleading and that the workshop and regular minutes should be posted in one place.

The Act does not require a public body to post its minutes on a website, and we therefore do not find any violation of the Act in this regard. While the navigability of a website may indeed relate to open government, and, as noted above, may particularly bear on public notice issues, we have no authority to address it in this context. Accordingly, we encourage journalists, who often have exposure to a broad variety of public bodies' websites, to bring their concerns and suggestions to the public body in question and to the Joint Committee on Transparency and Open Government, created this year by SG § 2-10A-14.

E. Minutes – identification of members voting

Complainant alleges that the Town's minutes do not record the votes of each member. By way of illustration, he quotes minutes reflecting that "four Councilmembers voted Aye," and "one Councilmember voted Nay" on a vote concerning sprinkler systems in residences. The question is whether that information satisfied the Act's requirement that minutes "reflect ... each vote that was recorded." SG § 10-509(c). We have addressed SG § 10-509(c) generally, *see* 6 *OMCB Opinions* 164, 168 (2009), and we have applied the requirement in SG § 10-509(c)(2) that minutes record the vote of each member

as to closing a session, see 1 *OMCB Opinions* 201, 204 (1997), but we have not addressed this question.

Few courts have discussed whether holding a "recorded vote" means recording the names and votes of each member of the public body participating in the vote. The historical use of the term suggests that while the members' votes are taken separately, only the totals of the "ayes" and "nays" need be recorded. *See, e.g.*, *People ex rel. Zeno v. Illinois State Board of Dental Examiners*, 278 Ill. 144, 148 (Ill. 1917) (describing a bill as having been "passed by a constitutional majority of the house, the recorded vote being, yeas 121, nays none"); *see also State ex rel. Reed v. Smith*, 15 Ore. 98, 104-105 (Or. 1887) (reciting, "[t]he president put the question to vote viva voce, and there was a sound of ayes and a sound of noes, but no call was made for a recorded vote by ayes and noes, nor for a division and special count of votes"). The context in which the term is used, however, is important, as illustrated by a California court's discussion of whether statutes requiring a city legislature to hold a "recorded majority vote" required it to memorialize each participating member's vote. Noting that the statutes were "silent concerning the degree of specificity with which such a [recorded vote] must be set out in the minutes," the court explained the usual meaning of the term as follows:

> The lay meaning of the verb "record" in the context of voting is essentially to cast a vote in such manner that it is duly counted. (See 13 Oxford English Dict. (2d ed. 1989) p. 362 ["to give (a verdict or vote)"].) In the context of parliamentary procedure, however, "recorded vote" appears to be a term of art meaning a *method of voting* that requires each member to distinctly register his or her vote, or at least the fact that he or she voted. It is contrasted to, among other methods, a *viva voce* (live voice) vote, in which the votes of individual members often cannot be distinguished. [citation omitted].

City of King City v. Community Bank of Central California, 131 Cal. App. 4th 913, 940-941, n. 18, 32 Cal. Rptr. 3d 384 (Cal. App. 6th Dist. 2005). The court then looked to legislative purpose:

> The requirement of a "recorded vote" ... is no doubt intended to ensure some measure of accountability on the part of local legislators who approve (or refuse to approve) expenditures of public funds. (See generally *Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 520 [64 Cal. Rptr. 2d 143], quoting *Dry Creek Valley Assn., Inc. v. Board of Supervisors* (1977) 67 Cal. App. 3d 839, 844 [135 Cal. Rptr. 726] ["There is a strong public policy 'that members of public legislative bodies

> take a position, and vote, on issues brought before them' "].) Arguably this objective is adequately served if members vote distinguishably at an open meeting, where interested parties may take note of their individual positions. However, it might be supposed that the objective of accountability is better served by requiring not only that votes be taken in a manner disclosing which members voted, but that the vote of each member be set down in a record accessible to the public. (See generally 5 McQuillen, Law of Municipal Corporations (3d ed. 2004) Municipal Records, § 14:5, pp. 15–16.)

Id., 131 Cal. App. 4th at 941 (brackets in the original). The court held that it could not resolve the issue on the record before it. *Id.*

We agree with the *King City* court's statement that "the objective of accountability is better served by requiring not only that votes be taken in a manner disclosing which members voted, but that the vote of each member be set down in a record accessible to the public." And, the objective of accountability, merely implicit in the California statutes, is expressly stated in Maryland's Open Meetings Act. The legislative policy of the Act states the following principle:

> The ability of the public, its representatives, and the media to attend, report on, and broadcast meetings of public bodies and to witness the phases of the deliberation, policy formation, and decision making of public bodies ensures the accountability of government to the citizens of the State.

SG § 10-501(b). The Act additionally makes clear that its goal of "accountability" applies not just to a public body, but to individual public officers: "It is essential to the maintenance of a democratic society that, except in special and appropriate circumstances ... citizens be allowed to observe ... the performance of public officials." SG § 10-501(a). We would therefore tend to interpret SG § 10-509 to require a public body which has conducted a recorded vote to specify the individual votes in its written minutes.

Our interpretation of SG § 10-509 (c) is buttressed by the 2011 amendment to the Act, which took effect on June 1, 2011, after this complaint was filed. Under the new SG § 10-509(b)(2)(ii), a public body voting on legislation may now substitute for its written minutes of the vote a prompt listing on the internet of "the individual votes taken by each member of the public body who participates in the voting...." The information included in such an internet posting is now "deemed to be the minutes of the open session." SG § 10-509(b)(3). No language in the statute suggests that the General Assembly

intended to permit a public body to include less information in written minutes than in minutes issued in the form of an internet posting. Thus, for votes on legislation, the General Assembly expects the public to be able to discern from the minutes, whether written or in the form of the substitute internet posting, how each member voted.

In sum, consistently with the 2011 amendment to the Act, we conclude that when a public body is required by other law or its own procedures to conduct a recorded vote on a matter, the minutes should inform the public how each member voted. Given the prior ambiguity of the Act's reference to "each vote that was recorded," we are not inclined to state that the Town violated the Act before the effective date of the amendment to SG § 10-509.

II

Conclusion

We conclude that the Town violated the Act by not giving adequate public notice of two meetings and that while perhaps the Town did not violate the Act with respect to the minutes addressed here, the recent amendment to the Act now makes clear that a public body's minutes should reflect the individual votes of each member participating in a recorded vote.

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